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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JENNA KASKORKIS and KIM CARTER,
individually and on behalf of all other
similarly situated,

Plaintiffs,

v.

GENERAL NUTRITION CENTERS, INC.,
a Delaware Corporation, GENERAL
HOLDINGS, INC., a Delaware Corporation,

Defendants.

Case No: 3:16-cv-00990-WQH-AGS

**DECLARATION OF TRENTON R.
KASHIMA IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL
FURTHER RESPONSES**

**DATE: TBD
TIME: TBD
JUDGE: Hon. Andrew G. Schopler**

1 I, Trenton R. Kashima, hereby declare as follows:

2 1. I am an associate attorney with the law firm of Finkelstein & Krinsk LLP,
3 attorneys for the Jenna Kaskorkis and Kim Carter in the above captioned case. I have
4 personal knowledge of the matters set forth herein, based on my active participation in
5 all material aspects of this litigation. If called upon, I could and would testify
6 competently to the facts herein based upon my personal involvement in this case. I
7 submit this declaration in support of Plaintiffs Motion to Compel Further Responses to
8 Plaintiffs' First Set of First Set of Requests for Production of Documents and First Set
9 of Special Interrogatories to General Nutrition Centers, Inc.

10 2. The parties held their Rule 26(f) Conference on August 8, 2016. During
11 its Conference, the parties generally discuss the topics that would be later incorporated
12 into the Parties' Joint Rule 26(f) Report and Discovery Plan.

13 3. On August 15, 2016, the Parties filed their Joint Rule 26(f) Report and
14 Discovery Plan [Dkt. No. 15]. This document included the parties' understandings and
15 agreements regarding the production of both physical and electronic documents, the
16 location of electronical stored information, foreseeable discovery topics, potential
17 witnesses, limitations of discovery, and the pretrial schedule.

18 4. The parties appeared for an Early Neutral Evaluation/Case Management
19 Conference, before the Hon. Jill L. Burkhardt, on August 23, 2016. The parties
20 expressed their opinion that settlement discussions may be premature. However, such
21 discussions may be fruitful after initial discovery. Accordingly, Judge Burkhardt
22 recommended that the parties meet and confer regarding discovery and set a date by
23 which their initial discovery exchanges could be completed. With that date established,
24 Judge Burkhardt further suggested that the parties either engage a private mediator or
25 contact her chambers for settlement discussion.

26 5. Also during the Case Management Conference, Judge Burkhardt
27 expressed doubts regarding the parties competing pretrial schedules, as presented in the
28 parties' Joint Rule 26(f) Report and Discovery Plan ("Rule 26(f) Report"). Judge

1 Burkhardt articulated her wish that the case move judiciously, and noted that she would
2 likely set a more abbreviated pretrial schedules than that which was proposed by either
3 party. At no time during the drafting and negotiation of the Rule 26(f) Report or during
4 the Early Neutral Evaluation/Case Management Conference did Defendant suggest that
5 it would be seeking any additional limits on the discovery topics disclosed.

6 6. On August 26, 2016, Plaintiffs served their First Set of Requests for
7 Production of Documents and First Set of Special Interrogatories to General Nutrition
8 Centers, Inc. Plaintiffs were seeking these initial documents and information to engage
9 in early settlement discussion (as recommended by Judge Burkhardt) and determine
10 additional discovery topics, including depositions and expert discovery. Additionally,
11 given that the Court had set a relatively short timeframe in which to conduct class
12 discovery, Plaintiffs needed timely responses to their initial requests in order to review
13 such documents with sufficient time to propound additional discovery (such as
14 depositions), allow their experts to review pertinent material, and prepare their class
15 certification arguments.

16 7. Additionally, given the subject matter of this case, Plaintiffs also
17 understood that discovery will likely involve electronically stored information (“ESI”).
18 Therefore, I sent a detailed letter regarding ESI discovery which proposed a number of
19 different proposed discovery protocols (such as key term searches and predictive
20 coding) and asked for additional information regarding Defendants’ computer systems
21 so that Plaintiffs may “minimize any potential discovery burden on [Defendants] and
22 provide Plaintiffs with a fair opportunity to receive information relevant to this lawsuit.”
23 Plaintiffs also offered to hold a meet and confer between the parties’ counsel and their
24 ESI consultants to facilitate any ESI discovery. Attached hereto as **Exhibit A** is a true
25 and correct copy of my August 26, 2016 letter. There was no respond to my August 26,
26 2016 letter.

27 8. On September 23, 2016, I sent a letter to Jimmy Nguyen, counsel for
28 Defendants, noting that Defendants’ responses to Plaintiffs were due on August 26,

1 2016, and that the parties should consider engaging Judge Burkhardt or a mediator for
2 settlement discussions. Attached hereto as **Exhibit B** is a true and correct copy of my
3 September 23, 2016 letter. I also asked Defendants to indicate if they intended to
4 substantively respond to Plaintiffs' initial discovery request as it may alter the timing of
5 the parties' settlement discussions.

6 9. Defendants responded to Plaintiffs' initial discovery requests on
7 September 26, 2016. Attached hereto as **Exhibits C & D** are a true and correct copy of
8 Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents
9 and First Set of Special Interrogatories to General Nutrition Centers, Inc., respectively.
10 Defendants largely responded to Plaintiffs' initial discovery requests on September 26,
11 2016 with either general objections or nonresponsive replies. Defendants' responses
12 did not mention any sampling procedure.

13 10. On October 3, 2016, Mr. Nguyen responded to my September 26, 2016
14 letter. Attached hereto as **Exhibit E** is a true and correct copy of Mr. Nguyen's October
15 3, 2016 letter. Mr. Nguyen stated that "rolling document productions" would
16 commence shortly and mediation could be scheduled in the next couple of months, after
17 such documents were provided.

18 11. Given the deficiencies in Defendants' response to Plaintiffs First Set of
19 Requests for Production of Documents and Special Interrogatories, I sent a letter to Mr.
20 Nguyen on October 4, 2016 to request that Defendants agree to a telephonic meet and
21 confer regarding the discovery disputes. I also stated that a more detailed letter outlining
22 the deficiencies in Defendants' discovery responses would shortly follow. Ultimately,
23 the parties agreed to telephonically meet and confer on October 10, 2016. Attached
24 hereto as **Exhibit F** is a true and correct copy of the email chain between counsel
25 regarding the October 10, 2016 meet and confer telephone call.

26 12. Additionally, I formally responded to Mr. Nguyen's October 3, 2016 letter
27 and General Nutrition Centers, Inc.'s Responses and Objections to First Set of Requests
28 for Production of Documents and First Set of Special Interrogatories on October 7,

2016. Attached hereto as **Exhibit G** is a true and correct copy of my October 7, 2016 letter. This eight-page letter addressed each of General Nutrition Centers, Inc.'s objections and responses, point by point, in preparation for the parties' October 10, 2016 telephonic meet and confer. Plaintiffs particularly took issue with Defendants' general refusal to produce documents regarding the putative class, proposed rolling production, and evasive interrogatory responses.

13. The parties held their telephonic meet and confer on October 10, 2016, but were unable to come to any overarching agreement regarding their disputes. Defendants, however, did offer to take Plaintiffs' concerns under advisement and agreed to provide a more detailed written response to Mr. Kashima's October 7, 2016 letter.

14. On October 18, 2016, Zana Bugaighis, counsel for Defendants, sent a letter which addressed the issues identified in Mr. Kashima's October 7, 2016 letter and the parties' telephonic meet and confer. Attached hereto as **Exhibit H** is a true and correct copy of Ms. Bugaighis' October 18, 2016 letter. Defendants agreed to some concessions, such as providing additional responses to a limited number of Plaintiffs' Requests and providing "Plaintiffs with the bates range for documents responsive to each interrogatory" and to provide a privilege log for any objections on the basis of "Privilege" and "Third Party Privacy Rights." Additionally, Ms. Bugaighis noted that "GNC anticipates making a production of documents the week of October 24th." However, the parties did not come to any agreement regarding the majority of their disputes.

15. Under the Judge Burkhardt's Chamber Rules, parties are required to leave a voicemail with her Chambers if the parties are unable to resolve their discovery disputes within 30 days. *See* Judge Burkhardt's Chamber Rule IV(A). Accordingly, when Plaintiffs had not received Defendant General Nutrition Centers, Inc.'s amended responses on October 25, 2016, Vanessa Shakib, counsel for Plaintiffs, emailed Defendants' counsel to request that they join Plaintiffs' counsel on a call to Judge

1 Burkhardt's Chambers. Attached hereto as **Exhibit I** is a true and correct copy of the
2 email chain between counsel regarding the October 26, 2016 Chambers call.

3 16. Counsel contacted Judge Burkhardt's Chamber and left two voicemails.
4 Due to the limited time available to leave a message, Plaintiffs' counsel and Defendants'
5 counsel each left their own voicemail regarding their respective position. It was only
6 during Defendants' voicemail that Plaintiffs first learned that Defendant was
7 considering a "sampling procedure," but no further details were provided.

8 17. I was surprised by this revelation because Defendants had not informed
9 Plaintiffs' counsel that any proposed sampling was contemplated during the parties'
10 meet and confer. Additionally, Plaintiffs had provided a detailed letter regarding
11 establishing search terms or other methods to limit ESI discovery in August, but had
12 received no response. Thus, I emailed Ms. Bugaighis after the Court call to inquire
13 further regarding Defendants' sampling proposal, including "what type of sampling, on
14 what category of documents, Defendant may be proposing." Bugaighis responded that
15 Defendants still were "attempting to determine a methodology that will not be overly
16 burdensome," and "[Defendants] have not yet determined this methodology... [thus]
17 believe the discovery dispute is premature." *Id.* Attached hereto as **Exhibit J** is a true
18 and correct copy of the October 26, 2016 email chain between counsel regarding the
19 proposed sampling procedure. Accordingly, Plaintiffs' counsel awaited further details.

20 18. On October 31, 2016, Judge Burkhardt issued a Minute Order directing the
21 parties to call the Court for a telephonic Discovery Conference on November 1, 2016.
22 [Dkt. No. 24]. The parties appeared as required on November 1, 2016 to discuss their
23 discovery dispute. Judge Burkhardt noted that she would not be deciding the merits of
24 the parties' dispute, but instead would determine what further steps should be taken by
25 the parties. During the Conference, the parties outlined their positions and discussed
26 the dispute. Plaintiffs raised their concerns regarding the timeliness of the document
27 production. The parties also discussed the proposed protective order. Defendants
28 reiterated the position established in Ms. Bugaighis' October 26, 2016 email:

Defendants were still working on developing a proposed sampling methodology with their clients and would provide Plaintiffs with their proposal shortly. Defendants' counsel repeatedly stated that any proposal discussed was tentative because it would have to be approved by their client. However, Defendants proposed a sampling of handful of documents (the parties may select three products from nine undefined categories) products in lieu of all 4,000 products.¹ I protested that such a sample size would likely be statistically insignificant. Additionally, I noted that "devil is in the details" and Plaintiffs could not consider Defendants' proposal until more details were provided. Plaintiffs also suggested that the parties appoint electronically stored information ("ESI") liaisons to facilitate discovery at this time. Judge Burkhardt order the parties to call her Chambers on November 21, 2016, and leave a voicemail, if the dispute was not resolved.

19. Defendants provided Plaintiffs with their amended responses to the outstanding discovery on November 10, 2016. Attached hereto as **Exhibits K & L** are a true and correct copy of Defendants' Amended Responses to Plaintiffs' First Set of Requests for Production of Documents and First Set of Special Interrogatories to General Nutrition Centers, Inc., respectively. Plaintiffs never received a concrete proposal from Defendant regarding how any sampling would be conducted, a list of products from which Plaintiffs may select its sample, the product categories from which Plaintiffs may choose the samples, or what documents would be provided for the selected products before or after receiving Defendants' Amended Responses.

20. On November 11, 2016, Defendants' finally produced their first batch of documents – three documents numbered GNC_Kaskorkis_000001 through GNC_Kaskorkis_000003. One document was an organization chart and the other two

¹ The Court encouraged the parties to hold a meet and confer conference after the Call. Accordingly, the parties called each other after the Discovery Conference. Defendants' counsel offered little additional details regarding their sampling proposal. For example, Plaintiffs inquired regarding the identity of the "nine divisions" discussed mentioned on the call, but Defendants were unable to identify these divisions, Defendants' counsel promised to provide such details.

1 documents were excel spreadsheets (one regarding the purchase history of Plaintiff and
2 the other held an unknown significance).

3 21. Judge Scholper replaced Judge Burkhardt as the presiding Magistrate
4 Judge on the case shortly after the parties' Discovery Conference. Rebecka Garcia, a
5 paralegal at my firm, contacted Judge Scholper's Chambers to inquire if Judge Scholper
6 would like the parties to call on November 21, 2016, and leave a voicemail, if the
7 discovery dispute was not resolved as ordered by Judge Burkhardt. The Court's Clerk
8 informed Plaintiffs that the parties should contact his chambers at 10:30 am on
9 November 21, 2016 if any disputes remain. I emailed this same information to
10 Defendants' counsel.

11 22. Because Defendants' amended responses were incomplete, contradicted
12 the parties' prior agreements, and did not include any responsive information, I sent
13 Defendants a letter outlining such deficiencies on November 18, 2016. Attached hereto
14 as **Exhibit M** is a true and correct copy of my November 18, 2016 letter. I stated that
15 Plaintiffs could not continue to wait for Defendant's proposed sampling procedure or
16 "rolling production" and that additional responses must be provided immediately.
17 However, I offered to meet and confer regarding the conduct of ESI discovery.

18 23. Defendants responded on November 19, 2016 in a letter. Although this
19 letter was addressed to me, it was not sent to my email address. Accordingly, I only
20 received this letter on the morning of November 21, 2016. Attached hereto as **Exhibit**
21 **N** is a true and correct copy of Ms. Bugaighis' November 19, 2016 letter. Ms. Bugaighis
22 emailed Plaintiffs' counsel to determine whether the parties were going to hold a call
23 with the Court as directed. I emailed Ms. Bugaighis back to inform her that Plaintiffs
24 could not wait for Defendants to provide additional details regarding its sampling
25 procedure (such as the products in nine divisions from which Defendants could select
26 its sample) or their "rolling" production (only three documents had been produced to
27 date). Accordingly, I notified Ms. Bugaighis of Plaintiffs intention to call the Court to
28 inform it of our intentions to file a motion to compel. I also invited Ms. Bugaighis to

1 join the call. Attached hereto as **Exhibit O** is a true and correct copy of the email chain
2 between the parties regarding the November 21, 2016 Discovery Conference.

3 24. Ultimately, after discussing the matter before calling the Court, the parties
4 agreed to hold a Discovery Conference with the Court. During the November 21, 2016
5 call with Judge Scholper, the parties again outlined their discovery disputes.
6 Defendants argued that they had provided Plaintiffs a “proposed” sampling procedure
7 during the November 1, 2016 conference. Plaintiffs responded that they had understood
8 that any discussion by Defendants regarding a proposed sampling procedure was
9 preliminary, given Defendants’ counsel had not secured the approval of its Clients, and
10 that a more formal proposal was pending. Judge Scholper heard the parties without
11 addressing the merits of their disputes. Instead, Judge Scholper suggested the parties
12 continue to meet and confer. Judge Scholper did, however, direct the parties to file a
13 motion to compel as soon as possible if an agreement could not be reached.

14 25. On November 23, 2016, Defendant produced five more documents
15 (GNC_Kaskorkis_000004 through GNC_Kaskorkis_000008), which were screenshots
16 of an unknown computer program and excel spreadsheets of unknown importance.

17 26. On December 5, 2016, I contacted Sean Sullivan, counsel for Defendants,
18 to inquire if Defendants would be opposed to Plaintiffs filing a thirty-page brief in
19 support of the Motion to Compel. Mr. Sullivan called me on December 6, 2016 and
20 stated that Defendants would not oppose a request to file a thirty-page brief in support
21 of the Motion to Compel, conditioned on the agreement that Plaintiffs would not oppose
22 Defendants filing thirty-page brief in opposing.

23 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws
24 of the United States of America that the foregoing is true and correct.

25 Executed on December 9, 2016 in San Diego, California.

26 /s Trenton R. Kashima
27 Trenton R. Kashima
28